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Residence Hotel and Resorts Sdn Bhd v Seri Pacific Corp Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-75–01 OF 2012
VT SINGAM J
20 FEBRUARY 2013

Civil Procedure — Judge — Application to recuse judge — Whether judge who allowed plaintiff's summary judgment can be recused from hearing defendant's counterclaim — Whether judge's advise to defendant to reconsider whether to proceed with counterclaim amounted to bias — Whether recusal application merely based on speculation of alleged bias — Whether earlier decision against a litigant by the same judge can be a ground for recusal — Whether application frivolous and abuse of the process of court

By the hotel management agreement ('the HMA'), the defendant had appointed the plaintiff to provide hotel management service. Subsequently, by a mutual separation and settlement agreement ('the MSSA'), the parties had agreed to terminate the HMA agreement. However, the defendant subsequently repudiated the MSSA. Therefore, the plaintiff lost its benefit of the HMA and lost the management and incentive fee for the unexpired initial tenure. The plaintiff commenced this action against the defendant for a sum of RM2,400,000. The defendant counterclaimed. On 14 September 2012, the court entered summary judgment in favour of the plaintiff's claim. On 25 October 2012, the plaintiff's solicitors applied (encl 17) under O 14A r 1 and/or O 33 r 2 of the Rules of the Court 2012 seeking orders in relation to whether the defendant was precluded from maintaining the counterclaim by reason of the operation of the doctrine of estoppels arising in consequence of the summary judgment and on the basis of the terms of the MSSA. The defendant then filed the present application (encl 20) to recuse the judge from proceeding to hear and decide encl 17, inter alia, on the grounds that the judge had allowed the plaintiff's application for summary judgment. It was also contended that the judge had in his grounds of judgment, in the summary judgment, 'advised' the defendant to reconsider its position as to whether to proceed with the counterclaim.

Held, dismissing encl 20 with costs:

(1) The Bench did not say or express any opinion on the success of the defendant's counterclaim in the event the defendant decide to proceed against the plaintiff or that the defendant will prima facie not succeed. The court had merely inquired whether the defendant would reconsider

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its position in respect of the counterclaim. However, if the defendant wished to proceed with the counterclaim, it was the defendant's right, in which case, it was a duty of the court to hear the parties and to decide on the evidence and submissions. The observation of the court as contained in the grounds of judgment did not necessarily mean that the court had made a finding on the merits of the defendant's counterclaim (see paras 19 & 20).

(2) In cases where any observation or ruling is required to be made by the court during the course of a trial or hearing of an interlocutory application, it cannot be taken as if the Bench has made up its judicial mind on the matter that is pending before the court. Accordingly, if the defendant's recusal application was entertained, it would be a matter of speculation of any alleged bias on the part of the Bench without any substantial basis or foundation. Further, it would place unnecessary or unwarranted restrain upon the court from requesting the parties whether through their counsels they may wish to reconsider their position taken previously when the claim or defence was filed with the view to consider an amicable settlement in view of the decision of the court in a related matter in order to save judicial time (see para 20).

(3) An allegation of bias or reasonable apprehension of bias is a serious allegation that calls into question the personal integrity of the judge and the integrity of the entire institution of justice. The grounds of apprehension of bias must be substantial, but however, each case must be evaluated in its own particular circumstances and in light of the whole proceedings. The party alleging bias has the onus of proving it. The grounds raised on the defendant's behalf in support of its application was not sufficient to recuse the Bench (see paras 24 &25).

(4) A judge's decision which does not favour a litigant cannot be used as an instrument to recuse the judge or to remove the case to another court as the opposing party's right is to file an appeal to the Court of Appeal to have the decision corrected if the loosing party is not satisfied with the decision. A party who is not satisfied with the decision should not as a matter of right apply to recuse the judge in hearing other pending or related matters (see para 27).

(5) Preconceived opinion by a judge do not constitute such a real bias so as to justify the recusal of the judge as the decision of the court in a pending matter will still be based and decided on the evidence and material produced or presented before the court and not on conjecture or speculation. There must be a strong foundation or ground for supposing that the judge or judicial officer had so acted in such unjudicial fashion that he cannot be expected fairly to discharge his judicial function and duty (see para 29).

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(6) The application was frivolous and was an abuse of the process of the court and was bordering interference with the judicial function of a judge who had made findings upon adjudication on the factual and legal disputes of the parties. Further, there was no evidence to support the allegation of bias, nothing upon which a reasonable person could reach that conclusion of bias other than, perhaps, a mere suspicion that the Bench may not bring an impartial mind to bear (see para 33).

[Bahasa Malaysia summary

Melalui perjanjian pengurusan hotel ('PPH'), defendan telah melantik plaintif untuk menyediakan perkhidmatan pengurusan hotel. Berikutan itu, melalui perjanjian pemberhentian dan penyelesaian bersama ('PPPB'), pihak-pihak telah bersetuju untuk menamatkan perjanjian PPH itu. Walau bagaimanapun, defendan kemudian telah membatalkan PPPB itu. Oleh itu, plaintif telah hilang faedahnya dalam PPH itu dan hilang pengurusan dan yuran insentif untuk tempoh awal yang belum tamat. Plaintif telah memulakan tindakan ini terhadap defendan untuk jumlah RM2,400,000. Defendan telah menuntut balas. Pada 14 September 2012, mahkamah telah memasukkan penghakiman terus menyebelahi tuntutan plaintif. Pada 25 Oktober 2012, peguamcara plaintif telah memohon (lampiran 17) di bawah A 14A k 1 dan/atau A 33 k 2 Kaedah-Kaedah Mahkamah 2012 dengan memohon perintah-perintah berkaitan sama ada defendan dihalang daripada mengekalkan tuntutan balas dengan sebab operasi doktrin estopel yang timbul akibat daripada penghakiman terus itu dan berdasarkan terma-terma PPPB. Defendan kemudian telah memfailkan permohonan ini (lampiran 20) untuk melucutkan kelayakan hakim daripada mendengar prosiding dan untuk memutuskan lampiran 17, antara lain, atas alasan bahawa hakim tersebut telah membenarkan permohonan penghakiman terus plaintif. Adalah juga dihujahkan bahawa hakim tersebut dalam alasan penghakiman beliau, dalam penghakiman terus itu, 'menasihati' defendan untuk mempertimbangkan semula kedudukannya berhubung sama ada untuk meneruskan dengan tuntutan balas itu.

Diputuskan, menolak lampiran 20 dengan kos:

(1) Mahkamah tidak mengatakan atau menyatakan apa-apa pendapat berhubung kejayaan tuntutan balas defendan sekiranya defendan memutuskan untuk memulakan tindakan terhadap plaintif atau bahawa defendan secara prima facie tidak akan berjaya. Mahkamah hanya bertanya sama ada defendan akan mempertimbangkan semula kedudukannya berkaitan tuntutan balas itu. Walau bagaimanapun, jika defendan berhasrat untuk meneruskan dengan tuntutan balas itu, ia adalah hak defendan, yang mana dalam hal ini, ia adalah kewajipan mahkamah untuk mendengar pihak-pihak dan untuk memutuskan keterangan dan hujah-hujah. Pemerhatian mahkamah sepertimana

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terkandung dalam alasan-alasan penghakiman tidak semestinya bermaksud bahawa mahkamah telah membuat penemuan berdasarkan merit tuntutan balas defendan (lihat perenggan 19 & 20).

(2) Dalam kes-kes di mana mana-mana pemerhatian atau keputusan perlu dibuat oleh mahkamah sepanjang suatu perbicaraan atau perbicaraan untuk permohonan interlokutori, ia tidak boleh dianggap bahawa mahkamah telah membuat keputusan kehakiman berhubung perkara yang masih belum selesai di hadapan mahkamah. Sewajarnya, jika permohonan defendan berhubung penarikan diri hakim dilayan, ia akan menjadi perkara spekulasi tentang apa-apa berat sebelah yang dikatakan di pihak mahkamah tanpa apa-ap asas yang kukuh. Selanjutnya ia akan meletakkan sekatan yang tidak perlu atau tidak wajar ke atas mahkamah daripada memohon pihak-pihak sama ada melalui peguam mereka, mereka mungkin berhasrat untuk mempertimbangkan semula kedudukan mereka yang terdahulu apabila tuntutan atau pembelaan difailkan dengan tujuan untuk mempertimbangkan penyelesaian secara baik berdasarkan keputusan mahkamah dalam hal yang berkaitan bagi menjimatkan masa kehakiman (lihat perenggan 20).

(3) Pengataan berat sebelah atau kebimbangan munasabah berat sebelah adalah pengataan yang serius yang mempersoalkan integriti peribadi hakim dan integriti institusi keseluruhan keadilan. Alasan-alasan kebimbangan berat sebelah mestilah besar, tetapi bagaimanapun, setiap kes perlu dinilai dalam keadaan yang tersendiri dan berdasarkan seluruh prosiding itu. Pihak yang mendakwa terdapat berat sebelah mempunyai beban untuk membuktikannya. Alasan-alasan yang dibangkitkan bagi pihak defendan untuk menyokong permohonan tidak mencukupi bagi melucutkan kelayakan hakim (lihat perenggan 24 & 25).

(4) Keputusan hakim yang tidak menyebelahi litigan tidak boleh digunakan sebagai alat untuk melucutkan kelayakan hakim atau memindah kes kepada mahkamah lain kerana pihak yang membantah mempunyai hak untuk memfailkan rayuan kepada Mahkamah Rayuan untuk memperbetulkan keputusan jika pihak yang kalah tidak berpuas hati dengan keputusan itu. Pihak yang tidak berpuas hati dengan keputusan itu tidak patut dalam hal perkara berhubung hak memohon hakim dilucutkan kelayakan untuk mendengar perkara-perkara lain yang masih belum selesai atau berkaitan (lihat perenggan 27).

(5) Pendapat praanggap oleh seorang hakim tidak membentuk apa-apa berat sebelah sebenar bagi mewajarkan penarikan diri hakim kerana keputusan mahkamah dalam perkara yang belum selesai masih akan digunakan dan diputuskan berdasarkan keterangan dan bahan yang dikemukakan di hadapan mahkamah dan bukan berdasarkan andaian atau spekulasi. Perlu ada asas atau alasan yang kukuh untuk menjangkakan bahawa hakim atau pegawai kehakiman telah bertindak sebegitu dengan cara

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yang tidak berasaskan kehakiman yang mana beliau tidak boleh dijangka secara adil untuk melaksanakan fungsi kehakiman dan kewajipan beliau (lihat perenggan 29).

(6) Permohonan itu adalah remeh dan satu penyalahgunaan proses mahkamah dan seperti campur tangan dengan fungsi kehakiman seorang hakim yang telah pun membuat penemuan selepas pengadilan berdasarkan pertikaian fakta dan perundangan pihak-pihak. Selanjutnya, tiada keterangan untuk menyokong dakwaan berat sebelah, tiada apa-apa yang mana seorang yang waras boleh membuat kesimpulan berhubung berat sebelah selain daripada, atas kemungkinan, syak wasangka semata-mata bahawa mahkamah tidak mungkin menyebabkan minda yang tidak berat sebelah berfikir sedemikian (lihat perenggan 33).]

Notes

For cases on application to recuse judge, see 2(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 4582–4597.

Cases referred to

Allied Capital Sdn Bhd v Mohamed Latiff bin Shah Mohd and another application [2001] 2 MLJ 305, FC (refd)

Ashmore v Corp of Llyod's [1992] 2 All ER 486, HL (refd)

Ayerst Makenna & Harrison Inc v Apotex Inc (1983) 41 OR (2d) 366, CA (refd)

Blanchette v CIS Ltd (1973) 36 DLR (3d) 561, SC (refd)

Boo Are Ngor (p) v Chua Mee Liang (p) (sued as public officer of Kim Leng Tze Temple) [2009] 6 MLJ 145, FC (refd)

Chandubhai Jethabhai Desai v The State And Anr AIR 1962 Guj 290, HC (refd)

Che Minah bt Remeli v Pentadbir Tanah, Pejabat Tanah Besut Terengganu & Ors [2008] 5 MLJ 206, CA (refd)

Clenae Pty Ltd & Ors v Australia & New Zealand Banking Group Ltd case [1999] VSCA 35, SC (refd)

Comsa Farms v Malaysian Assurance Alliance Bhd [2012] 10 MLJ 526; [2012] 3 CLJ 724, HC (refd)

Confectionately Yours Inc (Re) [2002] 219 DLR (4th) 72, CA (refd)

Dato' Dr Joseph Eravelly v Dato Hilmi Mohd Nor & Ors [2011] 3 CLJ 294, HC (refd)

Dato' Tan Heng Chew v Tan Kim Hor and another appeal [2009] 5 MLJ 790, CA (refd)

Deacons v White & Case Limited Liability Partnership & Ors [2003] 3 HKC 374 (refd)

Ebner v Official Trustee in Bankruptcy, Re Ebner (1999) 161 ALR 557, FC (refd)

Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors [1998] 1 SLR 374, CA (refd)

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Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637, CA (refd)
Jeyaretnam Joshua Benjamin v Lee Kuan Yew [1992] 2 SLR 310, CA (refd)
Johnson v Johnson (2000) 201 CLR 488, HC (refd)
JRL; Ex parte CJL, Re (1986) 161 CLR 342, HC (refd)
Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451, CA (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1, FC (refd)
Malaysian Assurance Alliance Bhd v Comsa Farms [2010] 1 LNS 977, HC (refd)
Marchand (Litigation guardian of) v Public General Hospital Society of Chatham (2001) 51 OR (3d) 97, CA (refd)
Medicaments and Related Classes of Goods (No 2), Re [2001] 1 WLR 700, CA (refd)
Metropolitan Properties Co Ltd (FGC) v Lannon and Others [1968] 3 All ER 340, CA (refd)
Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321, FC (refd)
Newfoundland Telephone Co Ltd v The Board of Commissioners of Public Utilities (1992) 89 DLR (4th) 289, SC (refd)
Porter v Magill [2002] 1 All ER 465, HL (refd)
R v Australian Steve Industry Board; ex p, Melbourne Stevedoring Co Pty Ltd (1953) 88 CLR 100 (refd)
R v Bertram [1989] OJ 2123, HC (refd)
R v Curragh Inc (1997) 144 DLR (4th) 614, SC (refd)
R v Gough [1993] AC 646, HL (refd)
R v Grandaur [2007] BCJ No 647, SC (refd)
R v LCC, Re Empire Theater (1894) 71 LT 638 (refd)
R v Papadopouslos (No 2) [1979] 1 NZLR 629, CA (refd)
R v RDS [1997] 3 SCR 484, SC (refd)
R v Smith & Whiteway Fisheries Ltd (NSCA) (1994) 133 NSR (2d) 50, CA (refd)
R v Steele (1895) 26 OR 540, CA (refd)
R v Watson; Ex Parte Amstrong (1976) 136 CLR 248, SC (refd)
Roseli bin Amat v PP [1989] 2 MLJ 65 (refd)
Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2009] 1 MLJ 555; [2008] 6 CLJ 235, CA (refd)
Webb v R (1994) 181 CLR 41, HC (refd)
Wewaykum Indian Band v Canada [2003] 2 SCR 259, SC (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92
Rules of Court 2012 O 14A, O 14A r 1, O 33 r 2
Rules of the High Court 1980 O 14 r 1, O 14 r 1(1)

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Kumar (Intan Azlina bt Mazlan with him) (Kumar & Partnership) for the plaintiff.
Wong Kian Kheong (Karen Lee with him) (Wong Kian Kheong) for the defendant.

VT Singam J:

[1] This is an application filed on the defendant's behalf (encl 20) to recuse me from proceeding to hear and decide the plaintiff's application under O 14A r 1 and/or O 33 r 2 of the Rules of Court 2012 (encl 17) which the plaintiff has filed on 25 October 2012 and the defendant's amended counterclaim dated 7 March 2012 (encl 9). The defendant's application is supported by the affidavit (No 1) affirmed on 17 December 2012 by En Mohamad Halim bin Merican, the general manager of the defendant — company (encl 21). On the other hand, the plaintiff has opposed the defendant's application and has filed an affidavit in reply affirmed on 21 December 2012 by Puan Nyak Rohana bt Nyak Ariff, the managing director of the plaintiff — company (encl 24). The defendant has also filed a reply by the affidavit (No 2) affirmed on 17 January 2013 by En Mohamad Halim bin Merican, the general manager of the defendant — company (encl 25).

[2] For convenience and brevity, it is important to include in this judgement, briefly, the background facts on which the defendant's application is based to recuse the bench from proceeding to hear and decide the plaintiff's application (encl 17) and the defendant's amended counterclaim (encl 9):

(a) on 19 January 2012, the plaintiff had filed a writ and the statement of claim (encls 1 and 2 respectively), against the defendant for the sum of RM2,400,000;

(b) on 7 March 2012, the defendant filed the amended statement of defence and counterclaim (encl 9); and

(c) on the 22 February 2012 the plaintiff filed the reply and defence dated 22 February 2012 (encl 6) to the pre-amended counterclaim dated 12 February 2012 (encl 5).

[3] By the statement of claim dated 19 January 2012 (encl 2), the plaintiff has pleaded, inter alia, and briefly as follows:

(a) by the hotel management agreement dated 27 March 2006 ('the HMA'), the defendant had appointed the plaintiff to provide hotel management service for an initial term of ten years commencing from 1 July 2006–30 June 2016. The HMA agreement was then supplemented by the supplemental agreement dated 3 August 2009 ('the supplemental agreement');

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(b) subsequently, by the mutual separation and settlement agreement dated 30 June 2011 ('the MSSA'), the plaintiff and the defendant had expressly agreed as follows:

(i) to terminate the HMA agreement;

(ii) the plaintiff would cease to manage the hotel on 30 June 2011 at 2359 hrs

(iii) the defendant to pay the plaintiff the sum of RM4,800,00 in the following manner:

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RM2,400,000 to be paid upon the execution of the MSSA ('the first settlement sum') ; and

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the balance settlement sum of RM2,400,000 to be paid on 31 December 2011 ('the balance settlement sum'),

(iv) the defendant to pay the plaintiff the management and incentive fees for:

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December 2010 amounting to RM115,207.85 one month from the final date;

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May 2011 amounting to RM97,364.45 one month from the final date; and

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June 2011, the amount of which to be determined on or before 30 July 2011 and payable within one month from the date of determination,

(c) the defendant had paid the first settlement sum upon the execution of the MSSA and had furnished the plaintiff with a post dated CIMB Cheque No 274823 dated 31 December 2011 for the balance settlement sum. The defendant had also fulfilled its obligation in respect of the management and incentive fees;

(d) on 28 December 2011, the defendant had breached the MSSA by countermanded the cheque for the balance settlement sum. Consequently, the balance settlement sum remains in arrears and is still due and owing;

(e) by the letter dated 28 December 2011, the defendant has repudiated the MSSA on the ground that they are no longer bound by the terms of the MSSA; and

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(f) therefore, the plaintiff has lost its benefit of the HMA and lost the management and incentive fee for the unexpired initial tenure.

[4] By the amended statement of defence and counterclaim dated 7 March 2012 (encl 9), the defendant has pleaded, inter alia, and briefly, as follows:

(a) the plaintiff had breached cl 3.4.1 of the HMA as the plaintiff had terminated its former employee, Encik Mohd Ansar Abdul Rashid ('Ansar') without cause or excuse. As a result, Ansar had commenced an action at the Industrial Court vide Industrial Court No 13/4–824 of 2011 against the defendant. The defendant is entitled to an indemnity against all awards made in the Industrial Court with costs and other expenses incurred;

(b) the plaintiff had breached cl 3.4.7 when it had failed to obtain prior authorisation of the defendant's board of directors before extending Ansar's employment when he reached 60 years of age;

(c) the plaintiff was negligent in carrying out its duty under the memorandum of settlement dated 9 September 2008 ('the MOS agreement') between Ansar and the defendant when they had failed to include the terms that Ansar is to be reinstated to his previous position subject to the retirement age of 62 years;

(d) the plaintiff was negligent in failing to inform the defendant on the matter concerning the MOS agreement and the payment of the backwages to Ansar;

(e) as a result, the defendant was forced to pay Ansar the sum of RM20,584 as backwages, which was not returned by Ansar when the MP agreement was withdrawn by the defendant; and

(f) therefore, the defendant counterclaims against the plaintiff as follows:

(i) a declaration that the plaintiff had breached the hotel management agreement dated 27 March 2006 (HMA) and the defendant has the right to claim for indemnity pursuant to cl 14.1 and 14.2 of the hotel management agreement (HMA).

(ii) an order for the plaintiff to pay the defendant:

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compensation for the payment that the defendant had paid to Ansar vide Industrial Court No 13/4–824 of 2011;

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costs, expenses and legal fees that has been paid by the defendant for the Industrial Court matter;

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sum of RM20,584 for Ansar's backwages; and

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interest at the rate of 4% on:

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the indemnity sum from the date of payment until the finalisation; and

()

backwages from 23 September 2008 until the full payment of the backwages by the plaintiff to the defendant,

(iii) costs; and

(iv) any other reliefs that this court thinks fit and just by this honourable court.

[5] By the reply and defence to the counterclaim dated 22 February 2012 (encl 6), the plaintiff has pleaded, inter alia, and briefly, as follow:

(a) all matters and disputes surrounding the HMA dated 27 March 2006 have been compromised and brought to an end pursuant to the MSSA dated 30 June 2011. The defendant is therefore estopped from relying on alleged breaches of the HMA dated 27 March 2006 to nullify and/or rescind performance of the MSSA dated 30 June 2011. The defendant is also estopped from seeking an indemnity and relying on cl 14.1 and 14.2 of the HMA against the plaintiff;

(b) the defendant had elected to compromise its differences or disputes with the plaintiff in respect of the HMA by entering into the MSSA;

(c) the plaintiff denies the defendant's allegation in the counterclaim; and

(d) the defendant's counterclaim ought to be dismissed with costs.

[6] On 28 February 2012, the plaintiff filed the summons in chambers dated 28 February 2012 (encl 7) for leave to enter summary judgment against the defendant for the sum of RM2,400,000 pursuant to O 14 r 1 of the RHC 1980 and applied for the following orders:

(a) that pursuant to O 14 r 1(1) of the Rules of the High Court 1980 judgment be and is hearby entered against the defendant for the sum of RM2,400,000;

(b) alternatively:

(i) that pursuant to O 14 r 1(1) of the Rules of the High Court 1980, judgment on liability for breach of the mutual separation and settlement agreement dated 30 June 2011 be entered against the defendant; and

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(ii) that an order be made for damages to be assessed by the senior assistant registrar,

(c) interest on the judgment sum to be calculated at the rate of 4%pa from 31 December 2011 till date of full realisation;

(d) costs; and

(e) any further or other relief this honourable court deems appropriate in the circumstances of this case.

[7] The grounds of the application to enter summary judgment against the defendant as included in the summons in chambers (encl 7) are as follows :

(a) pursuant to a mutual separation and settlement agreement dated 30 June 2011 (MSSA) executed between the plaintiff and defendant, the defendant agreed to pay the plaintiff the sum of RM4,800,000 in two instalments;

(b) the instalment amounting to RM2,400,000 was payable upon execution of the said MSSA and it was duly paid by the defendant;

(c) the balance settlement sum amounting to RM2,400,000 was payable by the defendant to the plaintiff on or before 31 December 2011

(d) the defendant has defaulted in settling the payment of the said balance settlement sum;

(e) the said balance settlement sum is still due and owing from the defendant to the plaintiff; and

(f) the defendant has no defence to this action on the merits.

[8] The defendant had contested the plaintiff's application to enter summary judgment:

(a) on 14 September 2012, this court granted leave to the plaintiff and entered summary judgment against the defendant for the sum of RM2,400,000. The oral decision with the broad grounds was delivered on 14 September 2012 which was read our by the learned senior assistant registrar of the High Court as I was on leave on that date;

(b) the defendant's amended counterclaim was fixed for case management on 29 October 2012; and

(c) on the request of the defendant's solicitors, the grounds of judgment dated 15 September 2012 was supplied to the defendant's solicitors.

[9] On 25 October 2012, the plaintiff's solicitors had filed an application

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(encl 17) under O 14A r 1 and/or O 33 r 2 of the Rules of Court 2012 seeking for the following orders:

(a) whether the defendant is precluded from maintaining and/or prosecuting the amended counterclaim dated 7 March 2012 (the counterclaim) filed herein by reason of the following:

  (i) the operation of the doctrine of estoppels arising in consequence of the judgment entered against the defendant on the 14 September 2012 by this honourable court; and/ or

  (ii) on the basis of the agreed terms of mutual separation and settlement agreement dated 30 June 2011 (MSSA) entered into between the plaintiff and the defendant,

(b) If issue (a)(i) and (ii) above are decided in favour of the plaintiff, the plaintiff seeks the following consequential relief:

  (i) that the counterclaim be dismissed;

  (ii) that the costs of this application and the costs related to the defence of the counterclaim be paid by the defendant to the plaintiff; and

  (iii) that such further or other order be made as this honourable court deems fit and appropriate in all the circumstances of the case,

(c) for an order that the issues as defined above be determined upon the arguments and submissions of counsel based on the following, without adducing any oral or further evidence:

  (i) the statement of claim dated 19 January 2012;

  (ii) the counterclaim;

  (iii) the reply and defence to counterclaim dated 22 February 2012;

  (iv) the MSSA; and

  (v) the hotel management agreement dated 27 March 2006 ('HMA'),

(d) the grounds of judgment in respect of judgment entered against the defendant on 14 September 2012, when made available.

[10] On 23 November 2012, the defendant's solicitors had filed an application (*notis usul*) to the Court of Appeal vide Application No W-08–821–11 of 2012 to seek leave for extension of time to file the notice of appeal against the decision of this court given on 14 September 2012 in respect of the summary judgment:

Note:

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(1) The defendant's application for leave to the Court of Appeal was filed on 23.11.2012 after the plaintiff had filed the application (Enclosure 17) on 25.10.2012 under O 14A and/or O 33 r 2 of the ROC, 2012 in this court.

(2) The defendant's solicitors had included the grounds of judgment dated 15.9.2012 as an exhibit in respect of the summary judgment in the affidavit in support of the said application for leave to the Court of Appeal.

[11] On 11 January 2013, the Court of Appeal had dismissed the defendant's application for leave with costs for the extension of time to file the notice of appeal.

Note:

The defendant's solicitors did not file the Notice of Appeal in court within the 30 days period from the date of the decision given on 14 September 2012 in respect of the Summary judgment which was entered against the defendant although the broad grounds of the decision was read out by the learned Registrar of the High Court in the presence of the defendant's counsel.

[12] In the meantime, on 17 December 2012, the defendant's solicitors filed this application (encl 20) to recuse me from proceeding to hear and decide the plaintiff's application (encl 17) and the defendant's amended counterclaim (encl 9) and has applied for the following orders:

(a) the honourable judge to recuse himself from hearing and deciding the following matters:

(i) the plaintiff's application under O 14A and/or O 33 r 2 of the Rules of Court 2012 which has been filed by the plaintiff;

(ii) the defendant's amended counterclaim dated 7 March 2012;

(iii) any related application;

(iv) in the event the judge recuse himself from hearing and deciding the matters aforesaid, the case be heard and decided by another judge of the High Court; and

(v) such further and other reliefs as this honourable court deems fit and suitable.

[13] The grounds which has been included in the said application to recuse the Bench is as follows:

(a) on 14 September 2012, I had allowed the plaintiff's application under O 14 r 1 of the Rules of the Court 2012 for summary judgment and had entered summary judgment against the defendant for:

(i) the sum of RM2,400,000;

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(ii) interest on the judgement sum to be calculated at the rate of 4%pa from 31 December 2011 till date of full realisation; and

(iii) costs,

(b) on 6 November 2012, the defendant had received a letter from the High Court, Kuala Lumpur informing the defendant's solicitors that the grounds of judgment was ready;

(c) on 7 November 2012, the defendant had collected the grounds of judgment. In the grounds of judgment, the judge had made findings and/or comments against the defendant which is as follows, in particular:

(i) para 13 of the grounds of judgment reads:

> On the factual matrix of the present case, this court is in the agreement with the contention on the plaintiff's behalf that the issues raised by the defendant is an afterthought to avoid payment to the plaintiff being the balance settlement sum of RM2.4m which was in fact paid by a post dated cheque 31.12.2011 and supported by the voucher dated 31.12.2011 (see Exhibit NRNA-2 of the plaintiff's affidavit in support (Enclosure 8)) until it was countermanded by the defendant by giving notice 2 days before the said cheque dated 31.12.2011 was due for payment. It is also clear that the hotel management agreement dated 27.3.2006 (HMA) and supplemented by a supplemental agreement dated 3.8.2009 (the supplemental agreement), had been effectively terminated as of 30.6.2011 by MSSA and the same has been expressly stated in the recital of the said mutual separation and settlement agreement dated 30.6.2011 by the MSSA (Exhibit NRNA-1A) of the plaintiff's affidavit in support.

(ii) para 16 of the grounds of judgment reads:

> Accordingly, the HMA which the defendant has relied on as a defence has no legal or enforceable effect as the same has been effectively terminated at the time of the execution of the MSSA. Therefore, any reference to the clauses or terms in the HMA is of no legal effect, unenforceable, and inadmissible under s.91 and s.92 of the Evidence Act, 1950 (see Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor [1993] 3 MLJ 633 at p 650) and this court is able to determine the issues raised by the defendant through the affidavit evidence.

(iii) para 17 of the grounds of judgment reads:

> The issue or issues raised on the defendant's behalf *are not triable issues* which merit a judicial trial and the defence does not disclose any merit. It is a defence to cloud the factual matrix of the present case which both the plaintiff and the defendant had freely and voluntarily agreed and entered into writing the MSSA and the MSSA is binding and enforceable.

(iv) para 18 of the grounds of judgment reads:

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In addition, the letter dated 28.6.2011 from the Industrial Relations Department was issued prior to the execution of the MSSA on 30.6.2011 wherein the defendant and the Ansar were notified that Ansar's representation of his dismissal has been referred to the Industrial Court (see paragraph 5.13 of the statement of case (Exhibit A-1(a) of the defendant's affidavit (No 1) (Enclosure 1)) where the cheque dated 31.12.2011 which was issued subsequently as an afterthought was counter commanded by the defendant.

(v) para 19 of the grounds of judgment reads:

This court is also in agreement with the contention on the plaintiff's behalf, inter alia, that:

d. The defendant's contention that the plaintiff's alleged breaches of the HMA has the effect of nullifying their obligation to pay the balance settlement sum pursuant to the MSSA is misguided and as an afterthought.

(vi) para 20 of the grounds of judgment reads:

In any event, the defendant's counterclaim in the present case is a dispute between Ansar and the defendant which had existed as early as September 2008. It is important to reiterate that the claim or representation made by Ansar against the defendant for his dismissal from the defendant's employment was a life issue at all material times when the MSSA was executed on 30.6.2011 and there was no surprise to the defendant. The defendant had freely and voluntarily entered into the MSSA with the plaintiff and the terms and conditions of MSSA are crystal clear as reproduced in this judgment for which the defendant had issued the post cheque dated 31.12.2011 in favour of the plaintiff which is treated as equivalent of cash towards the balance of the settlement sum.

(vii) para 22 of the grounds of judgment reads:

This is a case of a desperate defendant who has no desire to meet its obligations as contained in the MSSA and surely as an afterthought is attempting to deny and delay the plaintiff from obtaining judgment as expeditiously as possible which is provided under O 14 r 1 of the RHC 1980 by raising sham defences and which has no place to fit in even as an arguable defence to oppose the plaintiff's application to enter summary judgment.

(viii) para 29 of the grounds of judgment reads:

On the factual matrix of the present case, the defendant is not entitled in law or on the facts to withhold the payment being the balance settlement sum of RM2.4Million owing to the plaintiff by merely including a counterclaim so as to deny the plaintiff of his entitlement in law and on the facts with the hope that the plaintiff's application for summary judgment if allowed which no doubt must be obvious to the

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A

defendant, the defendant may be able to take advantage of the alleged counterclaim to stay the enforcement of the judgment against the defendant as any stay would cause grave injustice to the plaintiff.

The defendant is, therefore, not permitted to resile from its obligations as contained in the said MSSA. (see *Bon Chong Hing @ Chong Hing & Anor v Gama Trading Co (Hong Kong) Ltd* [2011] 4 MLJ 52). This is also a case of a high degree afterthought on the part of the defendant as the payment voucher dated 31.12.2011 (Exhibit NRNA-A2) and the cheque dated 31.12.2011 (Exhibit NRNA-2) are both self explanatory and the balance settlement sum of RM2.4Million has been approved and issued for payment to the plaintiff which is the basis of the plaintiff's claim.

B

C

(ix) paragraph 31 of the grounds of judgment reads:

Be that as it may, in view of the decision of this court, in respect of the plaintiff's application (Enclosure 7), perhaps, both parties may wish to advise their respective clients, the plaintiff to consider the procedural remedies available under the Rules of the Court in reference to the defendant's counterclaim and the defendant to reconsider its position as to whether to proceed with the counterclaim.

D

E

[14] In support of the defendant's application, learned counsel for the defendant has, inter alia, submitted and briefly as follows:

(a) the defendant does not allege any *actual bias* nor is there any allegation of impropriety. The finding contained in the decision had seriously prejudiced the defendant's counterclaim and there is a *real danger of bias* in the sense that:

F

(i) the Bench has unintentionally or unconsciously formed a concluded view that there is no merit in the counterclaim;

(ii) the Bench, may unfairly regard (or would have unfairly regarded) with favour or disfavour the amended counterclaim and the O 14A application, and/or;

G

(iii) the Bench, may not have an open mind to consider the defendant's opposition to O 14A application and/or the merits of the defendant's counterclaim,

H

(b) prays for an order in terms of the application (encl 20).

[15] In support of his submissions, learned counsel for the defendant has referred to the following cases:

I

(a) *R v Gough* [1993] AC 646;

(b) *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321;

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(c) *Allied Capital Sdn Bhd v Mohamed Latiff bin Shah Mohd and another application* [2001] 2 MLJ 305;

(d) *Dato' Tan Heng Chew v Tan Kim Hor* [2009] 5 MLJ 790;

(e) *Medicaments and Related Classes of Goods (No 2), Re* [2001] 1 WLR 700;

(f) *Porter v Magill* [2002] 1 All ER 465;

(g) *Webb v R* (1994) 181 CLR 41;

(h) *Johnson v Johnson* (2000) 201 CLR 488;

(i) *R v Papadopouslos (No 2)* [1979] 1 NZLR 629;

(j) *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310;

(k) *Deacons v White & Case Limited Liability Partnership & Ors* [2003] 3 HKC 374;

(l) *Newfoundland Telephone Co Ltd v The Board of Commissioners of Public Utilities* (1992) 89 DLR (4th) 289;

(m) *R v Curragh Inc* (1997) 144 DLR (4th) 614;

(n) *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451;

(o) *Roseli bin Amat v Public Prosecutor* [1989] 2 MLJ 65;

(p) *R v Watson; Ex Parte Amstrong* (1976) 136 CLR 248; and

(q) *Dato' Dr Joseph Eravelly v Dato' Hilmi Mohd Nor & Ors* [2011] 3 CLJ 294.

[16] On the other hand, in opposing the defendant's application, learned counsel for the plaintiff has submitted and briefly as follows:

(a) the defendant's application is *an abuse of the process of the court* and it was made in bad faith;

(b) the defendant had failed to establish any likelihood of real *bias* by the Bench and/or interest in the subject of this case that would warrant an order for recusal;

(c) the defendant has in fact confirmed that encl 20 is not based on any accusation of biasness against the Bench and is not meant to challenge the Bench's integrity or administration of justice. Instead, the defendant asserts that the 'real danger of bias' is in the form of the grounds in allowing the summary judgment to be entered against the defendant. That is not a valid reason to seek a recusal;

(d) the summary judgment was entered after an evaluation of the facts and evidence presented and after consideration of the submissions by counsel for both parties;

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(e) that the defendant can no longer rely on the indemnity clauses because the MSSA has brought the same to an end and compromised all differences arising thereunder between the plaintiff and the defendant;

(f) the alleged breach of the HMA as raised by the defendant had surfaced two and a half years *before the MSSA was entered into and that the same had been addressed by the parties when executing the MSSA.* As a result, the issue pertaining to Ansar Abdul Rashid was raised to countermand the cheque and delay the payment of the balance settlement sum to the plaintiff. (Emphasis added.);

(g) the defendant had failed to raise a triable issue in respect of the balance settlement sum;

(h) the findings as reflected in the grounds are premised on an extensive evaluation of the evidence presented and the application of the law to the facts as determined. In those circumstances, there is no room to allege biasness;

(i) this application was made to circumvent the application for preliminary disposal and to overcome difficulties resulting in the defendant's failure to appeal against the summary judgement;

(j) to permit such an application would tantamount to *opening floodgates* as it would invite applications for recusal by any dissatisfied litigant arising out of any order made in respect of all matters, including interlocutory application; and

(k) the plaintiff prays that the defendant's application to be dismissed.

[17] In support of his submissions, learned counsel for the plaintiff had referred to the following cases:

(a) *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasamasama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1;

(b) *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321;

(c) *Che Minah bt Rameli v Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors* [2008] 5 MLJ 206;

(d) *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637;

(e) *Boo Are Ngor (p) v Chua Mee Liang (p) (sued as public officer of Kim Leng Tze Temple)* [2009] 6 MLJ 143; and

(f) *Gabriel Peter & Partners (suing as a firm) v Wee Ching Jin & Ors* [1998] 1 SLR 374.

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[18] In reply, learned counsel for the defendant had reiterated his previous submissions and had, inter alia, stressed that the 'reasonable apprehension of bias' is based on the public perception and not whether any real danger of bias which the court has to take into consideration in determining this recusal application and relied on several passages of the authorities he had referred to in his skeleton submissions.

DECISION

[19] The grounds of the application by the defendant to recuse the Bench did not alleged bias of any uncivil behaviour of the Bench because of anger, intemperance, impatience or rudeness of the Bench but it is based on the findings of this court as contained in the grounds of judgment in respect of the summary judgment given in favour of the plaintiff. The Bench did not say or express any opinion on the success of the defendant's counterclaim in the event the defendant decide to proceed against the plaintiff or that the defendant will prima facie not succeed. While the defendant's counterclaim can proceed for trial and subject to the outcome of the plaintiff's application under O 14A and or O 33 r 2 of the Rules of Court 2012, it cannot be denied that it has nexus and is intertwined to the defence which was also raised to oppose the plaintiff's application to enter the summary judgment. Indeed learned counsel for the defendant has conceded that the counterclaim is intertwined with the subject matter of the plaintiff's claim. Nevertheless, this court had rejected the defence as having raised no triable issue or issues on the factual matrix of the case. This court found that there was no bona fide defence or any *arguable* defence and entered summary judgment in respect of the plaintiff's claim on 14 September 2012. It is important to state that this court had merely inquired whether the defendant would reconsider its position in respect of the counterclaim. However, if the defendant wishes to proceed with the counterclaim as pleaded, it is the defendant's right, in which case, it is a duty of this court to hear the parties on the materials produced in support of the counterclaim and of course to decide on the evidence to be proceeded and the submissions and subject to any other application.

[20] Therefore, the observation of this court as contained in the grounds of judgment and as referred to by the learned counsel for the defendant did not necessarily mean that this court had made a finding on the merits of the defendant's counterclaim. Similarly, and in cases, where any observation or ruling is required to be made by the court during the course of a trial or hearing of an interlocutory application, it cannot be taken as if the Bench had made up its judicial mind on the matter that is pending before the court. Accordingly, if the defendant's recusal application is entertained, it would be a matter of speculation of any alleged bias on the part of the Bench without any substantial basis or foundation. Further, it would place unnecessary or unwarranted restrain upon the court from requesting the parties whether through their

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counsels they may wish to reconsider their position taken previously when the claim or defence was filed with the view to consider an amicable settlement in view of the decision of the court in a related matter in order to save judicial time. Every latitude must be given to the court to make such findings as found in the grounds of judgment and is not beyond the permitted judicial latitude and there were materials to make that finding, be it ratio decidendi or obiter dicta. Reasoned decision is one of the essentials of justice and is vital for the purpose or showing to a litigant that he is receiving justice. 'Law governs man, reason the law'.

In *Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd and another application* [2001] 2 MLJ 305 at p 309, the Federal Court in refusing the application for leave to appeal against the whole of the decision of the Court of Appeal pursuant to s 96 of the Courts of Judicature Act 1964 said at p 309:

> We are satisfied that the judgment of the Court of Appeal has not raised any question of general principle which the Federal Court has not previously decided or any question of importance upon which further argument and a decision of the Federal Court would be to public advantage. The concurrent decisions of the High Court and the Court of Appeal on the said issues are in fact mere applications of well-established principles of law to the particular facts of the case. In such a situation, it would be highly unlikely that an appellate court would disturb such concurrent decisions. We are, *therefore, equally satisfied that, even if leave is given, the applicants would prima facie not succeed in the appeal.* (Emphasis added.)

[21] In the present case, and with respect, I did not comment or say anything to the effect that if the defendant proceeds with the counterclaim, he would prima facie not succeed in his claim. There was also no issue which had surfaced in respect of the observation made by the Federal Court in *Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd and another application* to the effect that 'even if leave is given the application would prima facie not succeed in the appeal', (see also *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555; [2008] 6 CLJ 235 at p 249 (E–F)).

[22] In so far as the two matters that are pending before this court, there is no basis to suggest that this court will not keep an open mind to persuasion by learned counsel for the defendant if the facts and the law favours his client's counterclaim. Further and in the event, the decision of this court on the two matters is not in the defendant's favour, the defendant is at liberty or has the right to file an appeal to the Court of Appeal against the decision. Therefore, this court is unable to appreciate the fear of bias on the part of the Bench as the decision of this court is not final and it is open to the defendant to have the decision tested at the Court of Appeal or with leave even right up to the Federal Court:

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Bias is commonly described as leaning, inclination, bent or predisposition towards one side or another or a particular result. It represents a predisposition to decide an issue or course in a certain way in its application to legal proceeding which does not leave the judicial mind perfectiy open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case. Bias generally refers to the mental attitude or disposition of the judge towards a party-litigant, rather than any views that he or she may entertain regarding the actual subject matter of the dispute (*R v Bertham* [1989] OJ No 2123 (QL), *R v S (RD)* 1997 3 SCR 484 at para 106).

[23] The test favourable for 'apparent bias' (the 'real danger of bias' test) has been set out by the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 at p 70 and followed in *Allied Capital Sdn Bhd v Mohd Latif bin Shah Mohd and another application* [2001] 2 MLJ 305 at p 310, *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321 at p 325, *Dato' Tan Heng Chiu v Tan Kim Ho* [2009] 5 MLJ 790 at p 301 (see also *R v Gough* [1993] AC 645 at pp 668–670). However, each case in which it is alleged that there arises a reasonable apprehension of bias will turn upon its own facts and be of little, if any, as precedent. In every case, it shall be a question of fact whether the words and/or conduct impugned would induce, in the mind of a reasonable observer with equivalent knowledge, 'a reasonable apprehension of real bias':

In *R v Gough* [1993] AC 646 at p 670; [1993] All ER 724 Lord Goff of Chieveley made four points concerning that test namely:

(a) it applies to all cases of apparent *bias*;

(b) it calls for an ascertainment of the relevant circumstances of the case;

(c) the 'court' there personifies the reasonable man; and

(d) the expression 'real danger' is preferred to 'real likelihood' to ensure that the court is thinking in terms of possibility rather than probability of *bias*.

[24] Viewing the complaint of the defendant which is based on the findings of this court as contained in the grounds of judgment in respect of the summary judgment, be it individually or cumulatively, this court is unable to find any reasonable apprehension of bias. There is no basis or foundation which could make the two pending matters, ie the plaintiff's application under O 14A and or O 33 r 2 of the Rules of Court 2012 and the amended counterclaim unfair or neither does it raise a 'reasonable apprehension of bias'. A judge swears on oath that he or she will be impartial, and there is a strong presumption that judges honour the oath and do dispense justice without bias (*R v RDS* [1997] 3 SCR 484 at para 117, *R v Smith & Whiteway Fisheries Ltd (NSCA)* (1994) 133 NSR (2d) 50 (CA)). An allegation of bias or reasonable apprehension of bias is a serious allegation that calls into question the personal integrity of the

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judge and the integrity of the entire institution of justice. The grounds of apprehension of bias must be substantial, but however, each case must be evaluated in its own particular circumstances and in light of the whole proceedings. The party alleging bias has the onus of proving it (*Marchand (Litigation guardian of) v Public General Hospital Society of Chatham* (2001) 51 OR 97 (CA) at para 131, (leave to appeal SCC refused, (2001) SCCA No 66)).

[25] Further, this court finds that the grounds raised on the defendant's behalf in support of its application is not sufficient to recuse the Bench. It will be a bad precedent to grant the defendant's application purely on the ground as raised in the application which is a mere speculation. It will also open the floodgates for a litigant or his lawyer to apply to recuse a judge when the decision of the court given in a interlocutory or related matter is not in his favour or and when the loosing party had failed to file an appeal to Court of Appeal against the decision of the court within the time frame provided under the Rules of Court. Admittedly, this application by the defendant to have the case heard by another judge is not because of any *actual bias* but it would appear to be because of the findings of the Bench in the interlocutory matter, ie the summary judgment which was not in his favour and seemingly the defendant is not prepared to accept the defeat and the decision of the court:

> The Advocate, it must be remembered, is not the mouthpiece of his client. His office is a higher one. To consider him in that light would be to degrade him. He gives to his client the benefit of his learning, his knowledge and his talents, but all through he must not forget what he owes to himself and to the court. He must not knowingly misstate the law, he must not willfully misstate the facts, though it be to gain the cause of his client He must bear in mind that if he is the advocate of an individual, retained and remunerated for his valuable services, he has a prior and perpetual retainer on behalf of truth and justice and there is no power which in any case or for any party or purpose can discharge him from that primary and paramount retainer. He must remember that the court is a temple of justice and the advocate at the bar as well, as the Judge upon the bench are equally ministers in that temple. The object of both should be the attainment of justice. Now justice is to be reached only through the ascertainment of truth and it must not be forgotten that the advocate as well as the Judge are both together concerned in this search for truth. The pursuit is indeed a noble one and honoured are those who are the instruments engaged in it. The advocate must realise that his task is a high and noble one — to assist the Judge in finding out the truth — and unless he performs this task in no half and uncertain measure with full consciousness of the sacred responsibility which rests upon him, — the wonderful edifice of justice which exists today cannot be sustained. The advocate must never forget that the advancement of justice and the ascertainment of truth are higher objects and nobler results than any which he can achieve in the field of his profession, (per PN Bhagwati J (later Chief Justice of India) in *Chandubhai Jethabhai Desai vs The State And Anr.* AIR 1962 Guj 290.

[26] As correctly submitted on the plaintiff's behalf, the decision of this court was based on the evaluation of the affidavit evidence which was

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supported by contemporaneous documents and case law and not on assumption or speculation or personal sentiment of the Bench and there is no suggestion that the decision of this court in the summary judgment 'lacked the appearance of independent and impartiality'. The findings of the court for the summary judgment is a proper discharge of a judicial function. The defendant's complaint is so out of line and not been placed in context. The public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so. Judicial impartiality requires that a judge approach the case with an open mind in the sense that he or she is open to persuasion. Bias is the predisposition to decide in a particular way that closes the judicial mind to being persuaded (*Wewaykum Indian Band v Canada* [2003] 2 SCR 259 at para 59, *R v Steele* (1895) 26 OR 540, *R v Bertram* [1989] OJ 2123 (HC), *R v RDS* [1997] 3 SCR 484 at para 106).

[27] While justice must be rooted in confidence; and confidence is destroyed and the right minded people may go away thinking 'the judge was bias', (Lord Denning in *Metropolitan Properties Co Ltd v Lannon (FGC)* [1968] 3 All ER 340 at p 309), it does not mean it is a blanket judicial disqualification to all applications for recusal as so to enable every litigant who would desire to have the judge who is assigned to hear his case be recused either for an ulterior object or extraneous or collateral purposes or to suit his desire merely because the particular judge's decision previously in an interlocutory or related matter did not favour him or whenever the litigant 'anticipate or suffer an unfavourable outcome'. If the application for recusal is allowed too freely, it would encourage tactical applications by litigants seeking another judge to hear their case and it ought not to be entertained. A judge's decision which did not favour a litigant cannot be used as an instrument to recuse the judge or to remove the case to another court as the opposing party's right is to file an appeal to the Court of Appeal to have the decision corrected if the loosing party is not satisfied with the decision. Under the circumstances, a party who is not satisfied with the decision should not as a matter of right apply to recuse the judge in hearing other pending or related matters by raising allegation of bias or 'reasonable apprehension of bias' which is a serious allegation as it will have far reaching effect on the decision of judges and calls into question the 'personal integrity' of the judge and the integrity of entire administration of justice, (*Marchand (Litigation guardian of) v Public General Hospital Society of Chatham* (2001) 51 OR 97 (CA) at para 131, (leave to appeal SCC refused, (2001) SCCA No 66), cause delay in the disposal of cases filed in court as the file has to be transferred to another judge who will have to reschedule the cases fixed in his or her court and it may cause a revolution

In *Comsa Farms v Malaysian Assurance Alliance Bhd* [2012] 10 MLJ 526; [2012] 3 CLJ 724, the defendant applied seeking the recusal of His Lordship

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Hamid Sultan Abu Backer J (Now JCA) not on the grounds of any forms of nexus directly or indirectly with the parties to the suit, but solely on the grounds that His Lordship had not allowed the 'Winding up petition' under the Companies Act against the plaintiff (which has nexus to the plaintiff for an indebted sum) and in that judgment, the judge had concluded that the petition was oppressive and vindictive, tantamount to an abuse of the process of the court, and the petition was filed in the view to paralyse the plaintiff (*Malaysian Assurance Alliance Bhd v Comsa Farms* [2010] 1 LNS 977). In dismissing the defendant's application, seeking His Lordship's recusal, Hamid Sultan Abu Backer J (Now JCA) said at p 737:

> The central complaint of the defendant is in relation to words such as 'oppressive', 'abuse of process' etc, as set out above in the judgment relating to a winding up petition. The law does not require the judge to mince his words when it is required in law to be expressed so. Words such as 'scandalous', 'frivolous', 'vexatious', 'abuse of process of court' are all found in the rules of court and the judge is required to make such findings when dealing with an action or winding-up proceedings, more so in striking out matter and also at all stages of trial pursuant to inherent jurisdiction (see *Charles Forte Investment Ltd v Amanda* [1963] 1 Ch D 240); *Chip Chong Sawmill Co Sdn Bhd & Ors v Chai Khium Fui* [1978] 1 LNS 28). When an application is scandalous, frivolous, abuse of process of court etc, it will also have some generic similarity to words such as 'mischievous' or 'vindictive' etc, to express the gravity of the conduct of the litigant. Even in a case of trial if the witness is not telling the truth, the judges have expressed it in different words such as 'not a witness of truth', 'lied' 'perjured', 'economical with the truth' etc. In my view, if such words are not expressed as required by law etc. within the norms of judicial propriety it will fall short of what we often refer to as a speaking judgment.
>
> Judicial propriety in essence is the unwritten code of ethical conduct practiced by judges to maintain the highest traditions of judicial rectitude, independence and impartiality. It is well-recognised that judgments should be objective, rational and temperate in language. They must be free from exaggeration and undignified expressions. That does not mean the judge is restrained from criticising in his judgment matters relevant to the conduct and merits of the case, and of persons who are witnesses, provided it is relevant to the case.
>
> Generally, judge's finding made according to law in a particular suit cannot be a ground for a recusal application in other suits. I am in total agreement with submission of learned counsel for the plaintiff, Datuk Ambiga Sreenevasan, that to justify disqualification or recusal, the judge's bias usually must be personal or based on some extrajudicial reason. Support for the proposition is found in a number of cases. To name a few are as follows:
>
> > (I) In *Locabail (UK) Ltd v Bayfield Properties Ltd and Another; Timmins v Gormley and Others* [2000] QB 451, the English Court of Appeal had this to say:
>
> It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot however, conceive of circumstances in which an objection could be soundly

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based on the religion, ethnic or national origin, gender, age, class, means of sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history nor that of any member of the judge's family, or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitors or advocates engaged in a case before him; or membership of the same Inn, circuit. Local law society or chambers (*KFTCIC v Icori Estero Sp A* (Court of Appeal of Paris, 28 June 1991, International Arbitration Report Vol 6 8/91).

> (II) *The Locabail* test has to be qualified by what was said by Justice Augustine Paul in the case of *Mohamad Ezam Mohd Nor & Ors v Inspector General of Police* [2001] 3 CLJ 198; [2001] 2 MLJ 481. The learned judge had this to say:
>
> Just as it is improper for a judge to hear a case when there may be a reasonable perception of bias if he hears the case, it is equally wrong for him to disqualify himself from hearing a case when there are no such grounds to do so. As a matter of fact, it would be a gross dereliction of duty for a judge to disqualify himself when there are no grounds.

I must say here the 'real danger of bias' test imposes a high threshold for the applicant to satisfy. In a yet unreported case (see *Michael Chow Keat Thye v Suruhanjaya Sekuriti Malaysia & Sime Darby Nominees Sdn Bhd,* Suit No R1–25–288–11/2011, Kuala Lumpur High Court), Justice Abang Iskandar bin Abang Hashim in an illuminating judgment went on to stress the nexus requirement within the judge, the parties and the objectivity of the administration of justice itself inclusive of the duty and obligation of the judge pursuant to his constitutional oath. His Lordship sums up the test for recusal in an eloquent and practical manner, and that part reads as follows:

> So in the final analysis, in the context of a potential conflict, it is not the question of whether or not a judge wants or insists, or that he does not want, to hear a case, because the practical test is rather simple, 'If there is no real danger of bias on the part of the judge, then he ought to, nay he is duty bound to hear the case, and there are no two ways about it.' I think that, in all humility, is the simple rule of the thumb for a judge to observe and apply.

On my part I will say that: (i) it will be a gross dereliction of duty for a judge to disqualify himself when there is no real danger of bias in hearing the case; (ii) when an application for recusal is made with no appropriate grounds or prospect of success such an application must be treated as an attempt to interfere with the administration of justice; (iii) in such instance, where appropriate, once the suit has been disposed of the court should proceed to issue show cause letter against the relevant person or persons who attempted to place the administration of justice to disrepute; and (iv) failure of the

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judge or the judiciary to protect the administration of justice will, in my view, also stand as dereliction of duty and omission to act pursuant to art 126 of the Federal Constitution which states:

> The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.

I am in total agreement with the learned counsel for the plaintiff that the defendant has not made out a case for recusal.
For reasons stated above, the defendant's application encl 33 is dismissed with no order as to costs.

In *Dato' Dr Joseph Eravelly v Dato Hilmi Mohd Nor & Ors* [2011] 3 CLJ 294, relied on by learned counsel for the defendant, I had in that case agreed and allowed the defendant's recusal application from hearing and deciding all proceeding in that action, including the trial, as:

(a) there was a Practice Direction No 5 of 2010 issued by the then Chief Justice of Malaysia that a judge hearing a case or trial should not be the mediation judge unless agreed to;

(b) in that case, I had acted as a mediation judge before the trial in the presence of the parties and the counsels but there was no agreement in writing which was signed by the parties that they had no objection for me to be the mediation judge since I was the trial judge;

(c) there was an issue of *credibility* of the parties on the factual matrix of that case, and it was an issue to be decided by the trial judge; and

(d) the subject matter of the plaintiff's claim had raised an issue of trust between the plaintiff and the defendant who were closed family friends and this was raised and discussed between the parties during the mediation. While those grounds, perhaps were not sufficient to find a *real danger of bias* on the part of the judge as I did not participate by making any preconceived opinion on hearing the versions exchanged between the parties, I had still agreed to recuse myself on the factual matrix in that case. However, I had made it clear in that case that I will not agree to recuse myself from hearing a case under any threat, fear or pressure imposed upon the Bench.

[28] On the other hand and in so far as the defendant's application before this court, I do not experience any discomfort or prejudice or possibility of prejudice operating in my mind for any particular reason which may possibly relate to any 'real danger of bias'.

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In *Re JRL; Ex parte CJL* (1986) 161 CLR 342 Mason J sitting in the High Court of Australia said at p 352:

> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of , encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

In *Re Ebner; Ebner v Official Trustee in Bankruptcy* (1999) 161 ALR 557, the Federal Court asked at p 568, para 37:

> Why is it to be assumed that the confidence of fair-minded people in the administration of justice would be shaken by the existence of a direct pecuniary interest of no tangible value, but not by the waste of resources and the delays brought about by setting aside the judgment on the ground that the judge is disqualified for having such an interest.

In the *Clenae Pty Ltd & Ors v Australia & New Zealand Banking Group Ltd case* [1999] VSCA 35 Callaway JA observed, at para 89(e):

> As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application.

In *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor* [2000] 1 All ER 65 at p 76, [2000] QB 451, the Court of Appeal said:

> It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided.
>
> The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case.

The Rt Honourable Lord Hailsham of ST Marylebone on *The Independence of the Judiciary in a Democratic Society* at the Riddle lecture 1978 at the New Hall, Lincoln's Inn, London on 24 May 1978 in his paper delivered and reported in [1978] 2 MLJ cxv said:

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> To begin with, in all contested litigation one party at least has got to lose. If a man wins his case it is natural that he should put down his success to the justice of his cause, and perhaps to his own transcendent performance as a witness. But, if he loses, the last person he will blame is himself. He will condemn first the incompetence or weakness of his own advisers and advocate, and the stupidity, or worse, of the judge, and finally the obliquity and cunning of the opposing advocate or solicitor, all of them members, it must be said, of the legal profession. So it is our fault if anything goes wrong. But, if all goes right it is nothing to our advantage.
>
> Judges are there to settle disputes as and when they have arisen, to settle disputes in criminal and civil matters. They cannot settle them without bias unless their position is absolutely secure.
>
> It is trite law that no one can be judge in his own cause, that is to say in a case in which he is directly or indirectly interested.
>
> Judges do not select the cases which come before them for decision, and when they do come before him the judge cannot duck the issue. He can neither pigeonhole the dispute as others are sometimes thought to do, nor pass the poisoned chalice to another. In litigation, the buck stops at the judicial bench. The judge must dispose of the case on one way or another, and, in a politically sensitive case, either way he will give rise to controversy, and if he declines jurisdiction or withholds the relief asked for he will equally give rise to controversy.

The Rt Honourable Lord Elwyn-Jones in his paper delivered speech on the *Independence of the Judiciary* at the Fourth Commonwealth Magistrates' Conference 1975 reported in [1976] 1 MLJ (viii), said:

> First, as to its significance for the judges themselves. I expect that many of us will have taken some form of oath or affirmation upon taking office as judge or magistrate. The oath which a judge in England and Wales swears before me is that he 'will do right to all manner of people after the laws and usages of this Realm without fear or favour, affection or ill-will'. But one Judge in a moment of nervousness swore that he would do right without fear or favour, affection or goodwill. The Lord Chancellor made him take the oath again correctly. I apprehend that in substance the judicial oaths, affirmations or undertakings in many other countries are similar to ours. These few words of the oath I have quoted incapsulate the whole duty of a judge. To be faithful to them is the test of his integrity as a judge. Implicit in this is that he must resist outside pressures and of course corruption. Independence is, in other words, a vital part of his judicial integrity.
>
> But most crucial is the watchful presence of independent and fearless judges able and willing to do justice between citizen and State according to the law and vigilant to ensure that the State and its officers do not exceed their legal powers.

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> Judges, like other servants of the Crown, should take adequate account of public opinion; but they must not be ruled by it. This means that there is bound to be criticism from time to time of the decisions of the Judges. In a free society that is not only inevitable, but it is no bad thing either. There used to be inhibitions about criticising courts and judges, but it is now nearly 40 years since Lord Atkin in a famous speech, known to all judges, said:
>
> No wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice.
>
> Many factors influence the standing and authority of Judges within our community. Authority generally is under widespread challenge and question. For us, die judges, the answer is clear: *be just and fear not*. (Emphasis added.)

[29] In taking this matter further, this court must say that even preconceived opinion by a judge do not constitute such a real bias so as to justify the recusal of the judge as the decision of the court in a pending matter will still be based and decided on the evidence and material produced or presented before the court and not on conjecture or speculation. There must be a strong foundation or ground for supposing that the judge or judicial officer had so acted in such unjudicial fashion that he cannot be expected fairly to discharge his judicial function and duty (*R v Australian Steve Industry Board; ex p, Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at p 116). Preconceived opinion by a judge if it exist in any matter, though it is unfortunate that a judge should have any, do not constitute such a bias, not even the expression or such opinions, for it does not follow that the evidence and materials to be produced at any subsequent matters will be disregarded (*R v LCC, Re Empire Theater* (1894) 71 LT 638 at p 39). Each case will be decided on the factual matrix of the case and not at the whims and fancies of the Bench. In any event, the observation of this court in the summary judgment did not raise the appearance of prejudging the merits.

[30] If the nature of the complaint as raised by the defendant is permitted or freely accepted as a ground to recuse a judge, as in the case before this court, no court will ever be able to safely make any findings, observation or tangible criticism against a party's case in the matter before the court in his or her grounds of judgement for fear that the findings or observation may be used as a ground to recuse the judge from further hearing related matters in the case on the 'filmiest pretext of bias' and that no doubt will interfere with the judicial independence conferred on the judge. In the present case, with respect, the findings and observations of this court in the summary judgment were justified on the factual matrix of the case and was supported by the contemporaneous and admissible documents produced by affidavit evidence. Therefore, with respect, it is most unfair, improper, undignified of the defendant to apply to recuse the Bench for making judicial findings and when the decision was given against him by raising grounds which on the face of it is flimsy and frivolous

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and ought not to be judicially tolerated and be should rejected *in limine*. It is important to maintain and for this court to dispense justice fearlessly and impartially and free from any intimidation or pressure.

[31] There cannot also be any 'shortcuts' or just lip service in the discharge of its judicial function. Similarly, counsel who attend court to represent their clients and argue their cases are also expected to uphold the course of justice without regard to their own interest, uninfluenced by fear or favour or any ulterior motive. Counsel paramount duty is to the court and to assist the court so that the court would be able to arrive at a just decision. If this court is not firm when deciding the defendant's recusal application, this court will forever be influenced by the fear factor of having to be recused through frivolous application by a loosing party to have his case heard by another judge and this would only delay the disposal of cases registered in a particular court. While a judge may recuse herself or himself depending on the particular circumstances of the case, yet the court must always be vigilant and watchful and never abdicate his judicial function by too readily allowing herself or himself to be recused out of fear that the loosing party may intend to cause further embarrassment to the Bench.

[32] This court would even go to the extent of saying that 'a judge's impatience, annoyance, anger, sarcasm, decision, rudeness and sharp remarks' are also insufficient to meet the test for establishing bias (*Confectionately Yours Inc (Re)* (2002) 219 DLR (4th) 72 (Ont CA), *R v Grandaur* [2007] BCJ No 647 (SC)). Unless the judge is seen to descend into the adversaries arena or demonstrates animosity or antipathy towards a party or a party's lawyer (*Ayerst Makenna & Harrison Inc v Apotex Inc* (1983) 41 OR (2d) 366 (CA) *Blanchette v CIS Ltd* (1973) 36 DLR (3d) 561 (SCC):

> To enable our justice system to function effectively, litigant and the public must have confidence that judges will be true to their oath of office and act impartially, without bias, for or against any party. In short, that judges must act judicially (*R v Gaudaur* (2007) BCSC 434).
>
> ... public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so (*Wewaykum Indian Band v Canada,* [2003] 2 SCR 259; 2003 SCC 45at para 57)
>
> A system of justice, if it is to have the respect and confidence of its society, must ensure that trials are fair and that they appear to be fair to the informed and reasonable observer. This is a fundamental goal of the justice system in any free and democratic society (*R v RDS* (1999) 3 SCR 484).
>
> It is right and proper that judges be held to the highest standards of impartiality since they will have to determine the most fundamentally important rights of the parties appearing before them. This is true whether the legal dispute arises between citizen and citizen or between the citizen and the state. Every comment that a judge

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makes from the bench is weighed and evaluated by the community as well as the parties. Judges must be conscious of this constant weighing and make every effort to achieve neutrality and fairness in carrying out their duties. This must be a cardinal rule of judicial conduct (*R v RDS* (1999) 3 SCR 484, *Wewaykum Indian Band v Canada* [2003] 2 SCR 259; 2003 SCC 45, at para 57).

[33] Having considered the grounds raised by the defendant, this court, with respect, finds that upon considering the background facts and the chronology of events, the application is frivolous and is *an abuse of the process of the court* and is bordering interference with the judicial function of a judge who has made findings upon adjudication on the factual and legal disputes of the parties. (*Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors* [1998] 1 SLR 374 at p 384, *Jasa Keramat Sdn Bhd Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637, *Che Minah bt Remeli v Pentadbir Tanah, Pejabat Tanah Besut Terengganu & Ors* [2008] 5 MLJ 206, *Boo Are Ngor (p) v Chua Mee Liang (p) (sued as public officer of Kim Leng Tze Temple)* [2009] 6 MLJ 145 at p 151). Further, there is no evidence to support the allegation of bias, nothing upon which a reasonable person could reach that conclusion of bias other than, perhaps, a mere suspicion that the bench may not bring an impartial mind to bear. My findings as contained in the grounds of judgment for the summary judgment did not 'shock or prick my judicial conscience' nor would it affect the presumption of impartiality so as to support a finding of 'real danger of bias' if the remaining two matters are heard and decided by me. In the circumstances, this court is of the considered view that the ground raised on the defendant's behalf in this recusal application has no relevance or basis to attract 'real danger of bias'. However, with respect, it is important that counsels who represent their client and without reference to any particular case or counsel, do not pretend to misinterpret the law or the documents or attempt to mislead this court but should assist the court to arrive at a just decision and must always be prepared to concede whenever the evidence is weak or law is obviously against his or her client. As litigant's only legitimate expectation is that he would receive justice which could only be achieved by assisting the judge to arrive at a just decision and accepting his ruling. A just decision is arrived at by the court on the correct application of law to the facts that are true and correctly pleaded, admissible and presented fairly to the court and found to be safe to rely upon and obviously with the assistance of counsel (*Ashmore v Corp of Llyod's* [1992] 2 All ER 486 at p 493, *Chandubhai Jethabhai Desai v The State And Anr* AIR 1962 Guj 290).

[34] In the circumstances and based on the background facts of the present case and in accordance with the rules of reasons and justice, the defendant's application (encl 20) is dismissed with costs.

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Enclosure 20 dismissed with costs.

Reported by Kanesh Sundrum